Supreme Court, U.S.
FILED
95 1074 JAN 4 - 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

RAYMOND C. KELLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID K. HOEL
Post Office Box 2796
Tulsa, Oklahoma 74101-2796
(918) 592-2275

Counsel for Petitioner
January 3, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Is an individual entitled to a jury trial to determine the issue of "willfulness" under 26 U.S.C. § 6672 when uncontroverted facts show that said individual in his capacity as the corporate president, in good faith, believed the taxes were paid?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Introduction	2
Statement of Facts	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES:

Burden v. United States, 486 F.2d 302 (10th Cir. 1973), cert. denied, 416 U.S. 904, 94 S.Ct. 1608, 40 L.Ed.2d 109 (1974) 4

Dembo v. United States, 988 F.2d 1029 (10th Cir. 1993) 4

DiStasio v. United States, 22 Cl.Ct. 36 (1990) 5

Dooley III v. United States, [92-1 USTC ¶ 50, 154] 4

Feist v. United States, 221 Cl.Ct. 531, 542, 607 F.2d 954 (1979) 6

Howard v. United States, [83-2 USTC ¶ 9528], 711 F.2d 729 (5th Cir. 1983) 4

In Re Sanders, 156 B.R. 854 (Bkrtcy. N.D. Fla. 1993) 5

Muck v. United States, 3 F.3d 1381 4

Teets v. United States, 29 Fed.Cl. 697 (1993) 6

Turpin v. United States, 970 F.2d 1344 (4th Cir. 1992) 5

STATUTES:

26 U.S.C. § 6672 ..... 2, 4, 5, 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2106 1

OPINIONS BELOW

This Petition for Certiorari arises from the order and judgment of the Tenth Circuit Court of Appeals dated October 6, 1995, (App. 1-5) affirming the partial summary judgment entered against the Petitioner/Plaintiff by the United States District Court for the Western District of Oklahoma dated September 1, 1994, (App. 11-14) and partial summary judgment entered against the Petitioner/Plaintiff by the United States District Court for the Western District of Oklahoma dated September 16, 1994, (App. 9-10).

JURISDICTION

This Court has jurisdiction to review the final orders and judgments of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). Furthermore, this Court has jurisdiction to vacate the orders and judgments below and order reconsideration of Petitioner's case pursuant to the Court's supervising powers under 28 U.S.C. § 2106.[1]

[1] **§ 2106. Determination.** The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FEDERAL STATUES INVOLVED

Title 26 U.S.C. § 6672 provides:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

STATEMENT OF THE CASE

A. Introduction.

The Petitioner, owner and corporate president of Kelley American Machine Tool Company, Inc. (the "corporation") brought an action in the United States District Court of the Western District of Oklahoma seeking refund of penalty assessed and collected by the Internal Revenue Service based on his alleged failure to pay over wage withholding taxes, and the Internal Revenue Service counterclaimed seeking to recover unpaid taxes, plus appropriate penalty and interest. The United States District Court for the Western District of Oklahoma, the Honorable Ralph J. Thompson, granted two motions for partial summary judgment in favor of the Internal Revenue Service.

B. Statement of Facts.

Prior to the corporation filing its petition for bankruptcy, the Petitioner, in his capacity as corporate president, issued and delivered two corporate checks to the Internal Revenue Service totalling $10,735.89 on December 19 and 21, 1988, believing there was sufficient funds to cover said checks for payroll taxes for the quarters ending December 31, 1987, and September 30, 1988. However, unknown to the Petitioner, the two payments did not clear the corporation's account. The Internal Revenue Service failed to notify the Petitioner or the bankruptcy trustee that the checks were returned due to uncollected funds. The Internal Revenue Service did not file a proof of claim for the quarters ending December 31, 1987, September 30, 1988, and December 31, 1988, trust fund taxes despite notice from the bankruptcy court, and a May 24, 1989, telephone call from the bankruptcy trustee's office requesting a proof of claim be filed.

The Petitioner attempted to fully pay the trust fund taxes on behalf of the corporation and the Petitioner fully believed that upon remitting payments to the government on December 19 and 21, 1988, that all trust fund employment taxes were current. From the record, the respondent has not questioned the Petitioner's belief that he thought the taxes were paid in full.

The corporation filed its Petition for Bankruptcy on December 29, 1988, in the United States Bankruptcy Court for the Western District of Oklahoma, Case No. 88-08077-TS. The Petitioner listed the Internal Revenue Service on Schedule A – Statement of All Liabilities of Debtor for non-trust fund taxes. The bankruptcy filing

occurred prior to the quarter ending December 31, 1988. At the time the corporation filed bankruptcy, sufficient funds existed in the corporation's bank account to pay the trust fund taxes owed the quarter ending December 31, 1988.

REASONS FOR GRANTING THE WRIT

In order for liability to attach under 26 U.S.C. § 6672 of the Internal Revenue Code, the Petitioner must not only be shown to be a responsible person,[2] he must also be shown to have willfully failed to comply with the statute. *Dembo v. United States*, 988 F.2d 1029, 1033 (10th Cir. 1993). Willfulness has been defined in the context of 26 U.S.C. § 6672 as meaning a "voluntary, conscious, and intentional decision to prefer other creditors over the Government." *Mack v. United States*, 3 F.3d at 1381; (citing *Dembo*, 988 F.2d at 1033 (quoting *Burden v. United States*, 486 F.2d 302, 304 (10th Cir. 1973), *cert. denied*, 416 U.S. 904, 94 S.Ct. 1608, 40 L.Ed.2d 109 (1974))). In *Dooley III v. United States*, [92-1 USTA ¶ 50,154], the court cited *Howard v. United States*, [83-2 USTC ¶ 9528], 711 F.2d 729 (5th Cir. 1983) and stated:

> "The issue of willfulness is necessarily directed to the state of the responsible person's mind, a subjective determination. This determination is usually factual and if sufficiently controverted, would preclude the granting of a summary judgment on penalty liability."

---

[2] The Petitioner does not deny being a responsible person as defined in 26 U.S.C. § 6672.

In the present case, there is a genuine question of material fact as to whether the Petitioner willfully failed to comply with the statute. The issue of willfulness by its very nature is an inquiry "necessarily directed to the state of the responsible person's mind". *Turpin v. United States*, 970 F.2d 1344, 1350 (4th Cir. 1992). "As such, this is the quintessential jury issue." *Id.*

It is apparent that the Petitioner did not possess the requisite willfulness for 26 U.S.C. § 6672 liability. The district court in its order granting partial summary judgment with respect to the taxes, premised its ruling on the fact that the Petitioner paid other creditors while aware of the corporation's tax obligation. (App. 12).

The Petitioner, on behalf of the corporation, attempted in good faith to pay the Internal Revenue Service. To the best of the Petitioner's knowledge, he had paid the corporation's tax obligations when he executed and delivered the checks to the Internal Revenue Service.

A responsible person may negate the willfulness prong required under 26 U.S.C. § 6672 by demonstrating the absence of knowledge that the taxes were not paid and the absence of a reasonable opportunity to discover and remedy the problem. *DiStasio v. United States*, 22 Cl.Ct. 36, 47-48 (1990). A responsible person is entitled to rely on standard business procedures and practices as a defense to 26 U.S.C. § 6672 liability. *In Re Sanders*, 156 B.R. 854 (Bkrtcy. N.D. Fla. 1993). Until February 1991, the Petitioner was unaware that the taxes at issue were not paid. Willfulness is not present if a responsible person demonstrates he "undertook all reasonable efforts to see that such taxes would in fact be paid in circumstances

where the employer had the means of payment and could reasonably be expected to make the payment". *Teets v. United States*, 29 Fed.Cl. 697, 211 (1993) (quoting *Feist v. United States*, 221 Cl.Ct. 531, 542, 607 F.2d 954, 961 (1979)).

In summary, the Petitioner believed that the money was in the account when he wrote and delivered the checks to the Internal Revenue Service. During the course of the administration of the bankruptcy estate, there were ample corporate assets available for the Internal Revenue Service to collect the withholding taxes. There are genuine fact questions concerning the Petitioner's willfulness under 26 U.S.C. § 6672 for taxes with respect to why the two checks payable to the Internal Revenue Service were dishonored.

CONCLUSION

The Petitioner believes that the imposition of the 26 U.S.C. § 6672 liability is an onerous penalty to punish corporate officials who fails to remit withheld taxes. The intent is not to punish honest individuals who believe in good faith that they paid their taxes.

Respectfully submitted,

David K. Hoel
Post Office Box 2796
Tulsa, Oklahoma 74101-2796
(918) 592-2275
(918) 592-0155 Telecopier

Petitioner's Counsel of Record

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND C. KELLEY, Plaintiff - Appellant,	)	No. 94-6376
v.	)	(W.D. Oklahoma)
UNITED STATES OF AMERICA, Defendant - Appellee.	)	(Case No. CIV-93-1691-T)

ORDER AND JUDGMENT*

Before **MOORE**, **ANDERSON**, and **BRORBY**, Circuit Judges.

(Filed Oct. 6, 1995)

Raymond C. Kelley appeals from the district court's summary judgment against him on his liability for taxes under 26 U.S.C. § 6672. He contends that the district court erred in finding that, as a matter of law, he was a responsible person who willfully failed to pay over withholding taxes under the statute. We affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

The Internal Revenue Code requires certain employers to withhold federal social security and income taxes from the wages of their employees and to remit the amounts to the IRS. 26 U.S.C. §§ 3102(a), 3402(a). Withholding occurs each pay period, but the funds are paid over to the government on a quarterly basis. Prior to the time they are paid over, the amounts withheld constitute a special fund held in trust for the benefit of the United States. 26 U.S.C. § 7501; *Slodov v. United States*, 436 U.S. 238, 242-43 (1978); *Purcell v. United States*, 1 F.3d 932, 936 (9th Cir. 1993). In order to assure that the trust fund taxes are properly collected and paid over, 26 U.S.C. § 6672 imposes personal liability upon certain responsible persons who willfully fail to discharge their responsibilities as follows:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

At issue in this case are trust fund taxes due for the fourth quarter of 1987 and the third quarter of 1988 (period A), as well as the fourth quarter of 1988 (period B). Mr. Kelley concedes that, throughout the relevant periods, he was responsible for collecting the trust fund taxes. He also admits that, rather than segregating the trust fund taxes at the time the company issued checks

for the employees' net wages, he left the money in the company's general checking account in order to cover operating expenses. Appellant's App. at 37-38. Nonetheless, he argues that his failure to pay the trust fund taxes was not willful for period A, and that he was not the responsible person for period B.

Applying a de novo review, *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 781 (10th Cir. 1995), we conclude that the district court did not err. In the context of section 6672, willfulness is the " 'voluntary, conscious and intentional decision to prefer other creditors over the Government.' " *Muck v. United States*, 3 F.3d 1378, 1381 (10th Cir. 1993) (quoting *Denbo v. United States*, 988 F.2d 1029, 1033 (10th Cir. 1993) (internal quotations and citations omitted)). Willfulness may also be shown by a reckless disregard of an obvious risk that the trust funds may not be paid to the government. *Denbo*, 988 F.2d at 1033 (citing *Smith v. United States*, 894 F.2d 1549, 1554 n.5 (11th Cir. 1990)). While mere negligence will not satisfy the willfulness requirement, *id.*, proof of willfulness does not require a showing of a bad motive. *Muck*, 3 F.3d at 1381 (citing *Burden v. United States*, 486 F.2d 302, 304 (10th Cir. 1973), *cert. denied*, 416 U.S. 904 (1974)). It is the responsible person's burden to show that his failure to remit taxes was not willful. *Id.*

Kelley's first argument focuses on his state of mind when, at the eleventh hour before filing bankruptcy, he attempted to pay the overdue taxes for period A with two

checks that were dishonored upon timely presentment.[1] First he argues that he did not know the checks would not be honored; and, second, he argues that the IRS should have resubmitted the checks, in which case one would have been paid. This argument ignores the critical fact that the taxes constitute a special fund held in trust for the United States from the time they are withheld from employees' paychecks.

Thus, contrary to Kelley's assertions, our consideration of willfulness begins with the responsible party's actions from the moment the employees' net wages are paid and taxes are withheld. As noted, Kelley did not segregate the trust fund taxes, but used them to cover operating expenses such as employees' wages and claims of other creditors, including himself. Each such payment was a "voluntary, conscious, and intentional" decision to prefer other creditors over the government. *See Purcell*, 1 F.3d at 938. In effect, he treated the government as a partner in his failing business, and with every disbursement, he increased the risk that the company would be unable to remit the funds when due.

As the responsible person, Kelley cannot negate his willfulness simply because he eventually wrote checks to

---

[1] In late December 1988, the company sent the IRS two checks, drawn on two separate banks, apparently to cover delinquent trust fund taxes for period A. Both were deposited for payment on December 28, and both were returned because of "uncollected funds." Appellant's App. at 149-50. During this same period, other company checks were returned. *Id.* at 145. Following a new deposit in one of the accounts, some of the returned checks were resubmitted and honored in early January 1989. *Id.* at 191.

the IRS which he believed – mistakenly – would be honored.[2] Moreover, the IRS's failure to resubmit the checks after the initial dishonors does not change our conclusion. The obligation imposed by the statute is on the responsible person, not the IRS. For the same reason, the fact that the company may have had sufficient money in the bankruptcy estate to cover the taxes is irrelevant.[3] *Smith v. United States*, 894 F.2d 1549, 1554-55 (11th Cir. 1990) (also noting that the failure to segregate trust fund taxes is an indication of willfulness).

Finally, we also reject Kelley's conclusory, two-sentence argument that he was not the person responsible for paying the trust fund taxes for period B, since the company filed for bankruptcy prior to the date the taxes were due. The fact that Kelley filed bankruptcy on the company's behalf two days prior to the quarter's end did

---

[2] Since any provisional balance in the two accounts was subject to collection and charge back, *see United States v. Cronic*, 900 F.2d 1511, 1516 (10th Cir. 1990), in fact, Kelley's failure to assure that there were sufficient collected funds to cover the checks he wrote is a further indication of reckless behavior amounting to willfulness. " '[A] bank is not required to honor checks that exceed the current collected balance in the depositor's account.' " *Id.* (quoting *Brady on Bank Checks*, at ¶ 18.1).

[3] Neither party's brief states why the IRS was unable to obtain payment from the bankruptcy estate. However, during oral argument, Kelley claimed, in essence, that the IRS should be estopped from collecting against him, since it failed to make any claim in the bankruptcy court. Inasmuch as he failed to raise this argument below or in his brief, it is waived. *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992).

not change his status as the person responsible for collecting the taxes in the first instance; hence he remains liable under the statute. *Slodov*, 436 U.S. at 247-50 (refusing to limit liability only to persons responsible for all three duties under the statute: "If § 6672 were given petitioner's construction, the penalties easily could be evaded by changes in officials' responsibilities prior to the expiration of any quarter."); *Thibodeau v. United States*, 828 F.2d 1499, 1506 (11th Cir. 1987) (finding it irrelevant that the corporation declared bankruptcy before trust fund taxes were actually due).

Accordingly, the judgment of the district court is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND C. KELLEY, Plaintiff and Counterclaim Defendant, v. UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff.	Case Number CIV 93-1691-T

JOINT STIPULATION AND ORDER

(Filed Oct. 11, 1994)

On this 11th day of October 1994, comes before the Court the Joint Stipulation and Order, approved for entry by plaintiff and counterclaim defendant, Raymond C. Kelley ("Kelley"), and by defendant and counterclaim plaintiff, the United States of America.

The parties agree that the $256.76 trust fund assessment made against Kelley in connection with the calendar quarter ending March 31, 1989, along with all statutory interest relating thereto, will be abated by the IRS effective immediately, and that any portion of the $257.00 payment made by Kelley on May 18, 1993, that was applied by the IRS in partial payment of such trust fund tax liability will be re-applied in payment of Kelley's trust fund liability for the quarter ending December 31, 1988.

The Court therefore finds, pursuant to its previous findings, as evidenced in the Orders dated August 2, 1994, September 1, 1994, and September 16, 1994, as follows:

1. Kelley's claim for refund with respect to the trust fund taxes assessed against him as a responsible person of Kelley American Machine Tool Co., Inc. ("Corporation"), pursuant to 26 U.S.C. Section 6672, that he paid in connection with the calendar quarters ending December 31, 1987, September 30, 1988, and December 31, 1988, is hereby denied.

2. The United States' counterclaim against Kelley for trust fund taxes owed by him as a responsible person of the Corporation for the calendar quarters ending December 31, 1987, September 30, 1988, and December 31, 1988, is hereby granted.

3. Kelley is ordered to pay the United States the sum of $12,223.89,[1] plus statutory interest on such amount, pursuant to 26 U.S.C. Section 6621. Of the $12,223.89 to be paid by Kelley to the United States, interest on the amount due for the calendar quarters ending December 31, 1987, and September 30, 1988, in the sum of $8,156.64, will accrue from March 9, 1992, the date on which the IRS assessed such amounts, through the date of payment. As to the remaining $4,067.25, owed by Kelley in connection with the calendar quarter ending

---

[1] This amount is calculated by applying the $257.00 previously paid by Kelley to the Internal Revenue Service ("IRS"), on May 18, 1993, in payment of the Trust fund taxes owed by the Corporation, in payment of his trust fund tax liabilities for the quarter ending December 31, 1988.

December 31, 1988, interest will accrue from May 4, 1992, the date on which the IRS assessed such amount, through the date of payment.

4. This stipulation constitutes a final appealable order in this action between Kelley and the United States, each party to bear their own litigation expenses, including costs and attorneys' fees.

5. Nothing in this joint stipulation and order shall be construed to affect Kelley's right to timely appeal the Court's findings contained in this Order, or the Court's Orders dated September 1, 1994, and September 16, 1994.

IT IS THEREFORE ORDERED AND ADJUDGED that the stipulation of the parties is hereby approved and adopted by the Court.

IT IS SO ORDERED this 11th day of October 1994.

/s/ Ralph G. Thompson
JUDGE RALPH G. THOMPSON
UNITED STATES DISTRICT COURT

VICKI MILES LaGRANGE
United States Attorney

ENTERED IN JUDGEMENT DOCKET ON OCT 11, 1994

/s/ Dennis M. Duffy 10-6-94
DENNIS M. DUFFY, OBA #13030
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6496
ATTORNEY FOR UNITED STATES

/s/ James T. Willis
James T. Willis, OBA #14339
616 South Main, Suite 308
Tulsa, Oklahoma 74119-1207
Telephone: (918) 582-0101
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND C. KELLEY, Plaintiff,	)	
vs.	)	NO. CIV-93-1691-T
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

(Filed Sep. 16, 1994)

Defendant United States of America filed a counterclaim in this action against plaintiff Raymond C. Kelley, seeking to reduce to judgment assessments against him for the trust fund portion of employment taxes owed by Kelley American Machine Tool Co., Inc. for the calendar quarters ending December 31, 1987, September 30, 1988, December 31, 1988 and March 31, 1989. All issues raised by the defendant's motion have been resolved except for the question of the plaintiff's liability for trust fund taxes owed by the corporation for the period from December 1, 1988 through December 29, 1988.

Liability is imposed by 26 U.S.C. § 6672 (1988) on any responsible person who has willfully failed to collect, account for, or pay over federal employment taxes. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). The withholding tax liability attaches when the wages are paid, not the date set for filing the return. *Mulee v. United States*, 648 F. Supp. 1181, 1185 (N.D. Ill. 1986). The court previously found that Kelley was a responsible person

during the December, 1988 period, but reserved judgment as to the issue of willfulness, pending its receipt of a supplemental brief which it directed the defendant to file.

The government asserts that the willfulness element is satisfied for the December 1988 taxes because Kelley admitted that he was unable to collect trust fund taxes at the time the corporation's payroll was paid. The government has now provided the court with an evidentiary basis to establish this fact, which results in the imposition of liability on the plaintiff for the December, 1988 trust fund taxes. *Williams v. United States*, 931 F.2d 805, 810-11 (11th Cir. 1991).[1]

Accordingly, the defendant's motion for partial summary judgment with respect to the plaintiff's liability for trust fund taxes owed for December 1988 is granted.

IT IS SO ORDERED this 16th day of September, 1994.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON
SEP 16 1994

---

[1] *The willfulness element also is satisfied by the plaintiff's act of paying the corporation's employees – other creditors – when he was aware of the tax obligation. Muck, 3 F.3d 1381-82.*

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND C. KELLEY, Plaintiff,	)	
vs.	)	NO. CIV-93-1691-T
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

(Filed Sep. 1, 1994)

Defendant United States of America filed a counterclaim in this action against plaintiff Raymond C. Kelley, seeking to reduce to judgment assessments against him for the trust fund portion of employment taxes owed by Kelley American Machine Tool Co., Inc. ("corporation") for the calendar quarters ending December 31, 1987, September 30, 1988, December 31, 1988 and March 31, 1989. The Internal Revenue Service had made the trust fund assessments in the amount of $12,737.65 against Kelley on the basis that he was a "responsible person" of the corporation under Section 6671 of the Internal Revenue Code, 26 U.S.C. § 6671 (1988), who willfully failed to pay over the taxes due from the corporation. The defendant filed a motion seeking partial summary judgment regarding Kelley's status as a "responsible person" and his liability for the trust fund assessments owed for the last quarter of 1987 and the third and fourth quarters of 1988.

Liability is imposed by § 6672 on any responsible person who has willfully failed to collect, account for, or

pay over federal employment taxes. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). The plaintiff did not contest his status as a "responsible person" for the fourth quarter of 1987 and the third quarter of 1988 ("Period A"). That aspect of the defendant's motion was, therefore, granted. The plaintiff asserted, however, that he did not act "willfully" with respect to the taxes owed for Period A, as he attempted to pay the taxes, and lacked control of the corporation when the fourth quarter ended on December 31, 1988 ("Period B"), due to the corporation's bankruptcy filing, thus absolving him of liability for the assessments for both periods. The defendant was directed to respond to the plaintiff's arguments in a reply brief.

Having received the supplemental brief, the court concludes the defendant is entitled to summary judgment with respect to the trust fund taxes owed by the corporation for Period A. The plaintiff argues that he did not act "willfully" because he wrote two checks to the IRS; the fact that they were dishonored was "due to the failure of checks received from creditors of the corporation to timely clear the corporation's account," not a "voluntary, conscious and intentional decision by Kelley to prefer other creditors over the United States." Plaintiff's opposition brief, p.2.

In the context of § 6672, willfulness means a conscious, voluntary and intentional decision to prefer other creditors over the government. *Id.* at 1381. It is undisputed that Kelley was aware of the corporation's delinquent trust fund assessments at least by September of 1988, when he received delinquency notices from the IRS and filed late trust fund tax returns. After September

1988, Kelley paid non-governmental creditors of the corporation sums exceeding the trust fund taxes owed for Period A. Kelley acted willfully by paying other creditors once he was aware of the tax obligation and, therefore, is liable for the trust fund assessments for Period A. *Muck*, 3 F.3d at 1381-82; *McDonald v. United States*, 939 F.2d 916, 919 (11th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992).

The plaintiff's defense to the government's claim for taxes owed for Period B is similarly unavailing. The corporation's bankruptcy filing on December 29, 1988 does not absolve the plaintiff of responsibility for the assessments as the trust fund was established and the withholding tax liability attached when the wages were paid and the taxes were collected, not on the date set for filing the return. *Mulee v. United States*, 648 F. Supp. 1181, 1185 (N. D. Ill. 1986).

Pursuant to 26 C.F.R. § 31.6302(c)-1(a)(ii)(a), the corporation was required to deposit the taxes within a Federal Reserve Bank or authorized financial institution within fifteen (15) days after the close of any month in which the aggregate amount of employment taxes was $500.00 or more. As employment taxes in excess of $499.00 were owed for each month, in Period B, the corporation was required to deposit the October 1988 taxes by November 15, 1988 and the November 1988 taxes by December 15, 1988. It is undisputed that Kelley failed to deposit the collected taxes into a tax depository account, but kept the monies in the corporation's general bank account and paid other creditors. Consequently, his failure to pay the collected taxes for October and November 1988 was willful. *Barnett v. United States*, 594 F.2d 219, 222 (9th Cir. 1979); *Mulee*, 648 F. Supp. at 1184-86.

The government asserts that the willfulness element is satisfied for the December 1988 taxes because Kelley admitted that he was unable to *collect* trust fund taxes at the time the corporation's payroll was paid. The government fails to specify the evidentiary basis for this argument and is directed to provide the court with some basis for this contention within five (5) days.

Accordingly, the defendant's motion for partial summary judgment is GRANTED with respect to the plaintiff's liability for trust fund taxes owed for Period A and the months of October and November of Period B.

IT IS SO ORDERED this 1st day of September, 1994.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RAYMOND C. KELLEY, Plaintiff,	)	
vs.	)	NO. CIV-93-1691-T
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

(Filed Aug. 2, 1994)

Defendant United States of America filed a counterclaim in this action against plaintiff Raymond C. Kelley, seeking to reduce to judgment assessments against him for the trust fund portion of employment taxes owed by Kelley American Machine Tool Co., Inc. ("corporation"), for the calendar quarters ending Dec. 31, 1987, Sept. 30, 1988, Dec. 31, 1988 and March 31, 1989. The Internal Revenue Service had made the trust fund assessments in the amount of $12,737.65 against Kelley on the basis that he was a "responsible person" of the corporation under Section 6671 of the Internal Revenue Code, 26 U.S.C. § 6671 (1988), who willfully failed to pay over the taxes due from the corporation. The defendant has filed a motion seeking partial summary judgment regarding Kelley's status as a "responsible person" and his liability for the trust fund assessments owed for the last quarter of 1987 and the third and fourth quarters of 1988.

Liability is imposed by § 6672 on a "responsible person," anyone required to collect, truthfully account for

or pay over employment taxes to the United States, who willfully fails to remit the taxes to the government. In his response, the plaintiff does not contest his status as a "responsible person" for the fourth quarter of 1987 and the third quarter of 1988 ("period A"). This aspect of the defendant's motion is, therefore, granted. The plaintiff asserts, however, that he did not act "willfully" with respect to the taxes owed for period A, as he attempted to pay the taxes, and lacked control of the corporation when the fourth quarter ended on December 31, 1988 ("period B"), due to the corporation's bankruptcy filing, thus absolving him of liability for the assessments for both periods.

The defendant is directed to respond to the plaintiff's arguments in a reply brief to be filed by August 16, 1994.[1]

IT IS SO ORDERED this 2nd day of August, 1994.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

---

[1] *The defendant anticipated and briefly addressed the plaintiff's "lack of willfulness" argument, but needs to supplement its brief on that issue.*